Casa Duramax, Inc. *and* Congreso de Uniones Industriales de Puerto Rico. Cases 24–CA–6132, 24–CA–6273, and 24–RC–7305

April 22, 1992

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On October 24, 1991, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Casa Duramax, Inc., Coto Laurel, Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held on April 5, 1990, in Case 24–RC–7305 is set aside and a new election held.

[Direction of Second Election omitted from publication.]

Virginia Milan, Esq., for the General Counsel.
Victor M. Comolli, Esq. and *Agustin Collazo, Esq. (McConnell, Valdes, Kelley, Sifre, Griggs & Ruiz-Suria)*, of San Juan, Puerto Rico, for the Company.
Nicolas Delgado, Esq. (Nicolas Delgado & Associates), of San Juan, Puerto Rico, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. Congreso de Uniones Industriales de Puerto Rico (the Union) filed unfair labor practice charges against Casa Duramax, Inc. (the Company), in Cases 24–CA–6132 and 24–CA– 6273 on April 20, 1990,[1] and January 2, 1991, respectively. The National Labor Relations Board's (the Board) Regional Director for Region 24, as an agent of the Board's General Counsel, issued an order further consolidating cases, consolidated amended complaint, and amended notice of hearing (the complaint), on February 28, 1991, pursuant to which I heard the cases in trial in Hato Rey, Puerto Rico, on July 8 and 9, 1991.

It is alleged in the complaint that the Company through certain of its agents and supervisors engaged in various acts that interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act (the Act).[2] It is further alleged that the Company violated Section 8(a)(3) of the Act by, on or about November 30, granting its employees Wilberto Torres (Torres); Manuel Bonilla (Bonilla); and Melquiades Vargas (Vargas); wage increases that were less than the wage increases granted to its other production and maintenance employees.

In a report and recommendations on objections, order consolidating cases, and notice of hearing, the Regional Director for Region 24 of the Board on July 20, consolidated certain of the Union's (Petitioner's) objections to conduct affecting results of the election (held on April 5) in Case 24–RC–7305 with the above-referenced unfair labor practice cases.

In its timely filed and amended answer, the Company admitted certain allegations but denied violating the Act in any manner.

I have carefully reviewed the entire record and have studied the posthearing briefs filed by counsel for the General Counsel, the Company, and Union. I have been influenced by my assessment of the witnesses as they testified. Based on the above, and as explained below, I find the Company violated the Act substantially as outlined in the complaint.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Stephens finds unlawful the threat that strikers' jobs will be ''lost'' to replacements because this statement is made against a background of other undisputed threats of discharge in retaliation for union activities. In this regard he finds the case closer to *Baddour, Inc.*, 303 NLRB 275 (1991), than to *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989), in which he dissented. See also *Mantrose-Haeuser Co.*, 306 NLRB No. 74, slip op. at 6–7 (Feb. 21, 1992) (concurring opinion) (finding statement not an unlawful threat to freeze benefits in context and in absence of other coercive statements); *Harrison Steel Castings Co.*, 293 NLRB 1158 (1989) (finding unlawful an employer's threat that union's advent will bring about job loss because of business competition where statement was made in context of other coercive statements).

Member Devaney does not agree that statements about job loss in Respondent's April 1990 leaflet violate Sec. 8(a)(1). The statements that an employer can continue operations with replacements for striking employees and that strikers could be permanently replaced in some situations are truthful, although incomplete, statements consistent with Board law regarding an employer's right to replace economic strikers. For the reasons discussed in his dissent in *Baddour*, Member Devaney would dismiss this allegation of the complaint. In doing so, he notes that the complaint does not allege that the leaflet indicated that strikes are inevitable but ultimately futile.

[1] All dates are 1990 unless I specify otherwise. The charge in Case 24–CA–6132 was amended on May 31 and June 28.

[2] The specific complaint allegations are set forth elsewhere.

FINDINGS OF FACT

I. JURISDICTION

The Company is, and at material times has been, a Puerto Rico corporation with a facility located at Coto Laurel, Ponce, Puerto Rico, where it is engaged in the construction of industrialized (prefabricated) houses. Annually, the Company purchases and receives goods and materials valued in excess of $50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. The complaint alleges, the parties admit, and I find, the Company is, and at times material has been, an employer engaged in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the parties admit, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

Early in 1990, the Union commenced an organizing campaign at the Company. On February 16, the Union filed a representation petition in Case 24–RC–7305. On February 20, Union Vice President Jose Figueroa requested in writing that the Company recognize the Union as the collective-bargaining representative of its employees. In his February 20, letter, Figueroa notified the Company that certain employees, namely Armando Troche, Bonilla, Torres, and Roberto Perez were ''the Union leaders in said unit.'' The Company and Union executed a Stipulated Election Agreement on March 5, which was approved by the Regional Director of Region 24 of the Board on March 6. An election by secret ballot was conducted on April 5, under the direction and supervision of the Regional Director for Region 24 of the Board. The tally of ballots duly served on the parties revealed that of the approximately 67 eligible voters, 27 voted for the Union (Petitioner) while 32 voted against the Union (Petitioner) with no void ballots cast. There were three challenged ballots cast which were insufficient in number to affect the results of the election. On April 10, the Union (Petitioner) filed timely ''Objections to the Election.'' On July 20, the Regional Director for Region 24 of the Board issued her report and recommendations on objections, order consolidating cases, and notice of hearing. In her report, the Regional Director overruled Objections 1, 3–9, and 12. She ordered a hearing be held to resolve the Union's (Petitioner's) three remaining objections, namely, Objections 2, 10, and 11. Objections 2, 10, and 11, follow:

> Objection 2: That on or about February 17, 1990, the Company threatened to close the factory if the Union won.
>
> Objection 10: That the Company through its supervisors asked for whom they were going to vote.
>
> Objection 11: That the Company changed the working conditions of the employees.

The critical period with respect to the representation case runs from the filing of the petition on February 16 until the close of the polls on April 5.

B. *The 8(a)(1) Allegations*

I shall address the 8(a)(1) allegations in the order outlined in the complaint.

1. The alleged violations attributed to Company President Alfonso Hernandez

It is alleged at paragraph 8(a)(i) of the complaint that Hernandez on or about April 5, on two separate occasions, promised employees the Company would sponsor an in-house union, and stated the Company would have closed had the Union won the Board-conducted election.

Torres, who worked as a carpenter for the Company for approximately 5 years until he was laid off, testified that after the Board-conducted election on April 5, his immediate supervisor, General Foreman Jose Guzman, hereinafter General Foreman Guzman, came to his work area and told him Jaime del Valle, the engineer in charge of the plant, wanted to see him in his office. Torres went to the designated office where General Foreman Guzman, del Valle, Company President Hernandez, Inabon Ready Mix Co. Engineer Quinones[3] and Attorney Lespier[4] were. Torres testified:

> When I arrived at the meeting and I found everyone there Mr. Alfonso Hernandez slapped me on the back. He said that I had expressed myself very well before him and . . . he told me that he was going to make better the plant by forming a committee . . . I was going to lead. He also told me the law did not permit him to tell that if the Union were to win . . . he would negotiate a closing of the plant.

Israel Mercado Hernandez, hereinafter Mercado Hernandez, who worked approximately a year for the Company as a laborer under the supervision of Vice President of Operations Angel Munoz-Ayala, hereinafter Munoz-Ayala, testified that on April 5, after the Board election had been held:

> There was a party and Mr. Alfonso Hernandez told us in front of the employees that he had a surprise for the employees that in two weeks the factory would have closed if he had lost the election.

The Company did not present President Hernandez with respect to these allegations nor was his absence explained in any manner.

The testimony of Torres and Mercado Hernandez was plausible, reasonable, uncontradicted, and therefore accepted.

I find Company President Hernandez' comments that if the Union had won the election, the Company would have closed in 2 weeks were coercive and violated Section 8(a)(1) of the Act. The record is void of any evidence that would indicate President Hernandez based his comments on any objective considerations or justifying circumstances such as economic necessity or as a result of matters beyond the Company's control.

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[3] Inabon Ready Mix is the parent company of Casa Duramax, Inc.

[4] It appears Lespier was company counsel at that time.

I also find Company President Hernandez' announcement and promotion of an employee committee (headed by employee Torres) that would function as an alternative to the Union constitutes unlawful interference with employee Section 7 rights in violation of Section 8(a)(1) of the Act. See, e.g., *Bay State Ambulance Rental*, 280 NLRB 1079, 1084–1085 (1986).

It is alleged at paragraph 8(a)(ii) of the complaint that Company President Hernandez on or about November 30, advised employees that it had withheld pay raises and additional vacation pay because of the pendency of the Union's representation proceedings before the Board, but that it nevertheless was granting them at this time, thereby informing its employees that the failure to get pay increases and additional benefits was because of the Union's organizational interest.

Vargas, a 6-year employee with the Company currently working as a welder for Vice President of Operations Munoz–Ayala, testified that an employee meeting called by management was held on November 30. He testified various management personnel as well as all employees attended. He stated Company President Hernandez told the employees the Board's case had been postponed until June 1991 and:

> he said he was going to give us . . . classifications and . . . told us that there would be an increase in salaries.
>
> He also commented to us that he would take the responsibility because he understood . . . the Board [did] not permit us being given an increase in salary. He also told us of a retroactive . . . six day payment for vacation.

Vargas said the increases were effective December 1.

Bonilla, who worked for the Company for approximately 5 years as a welder but was unemployed as of the trial herein, and Torres corroborated Vargas' testimony as outlined above.

Bonilla testified Company President Hernandez said he was giving the employees a salary increase because ''he had an inkling—feeling that the crane workers were going to leave'' the Company if he did not do so.

The above-credited testimony raises various questions. Why did Company President Hernandez grant the wages and other benefits increases that he did at the time he did? Was it to reward the employees for rejecting the Union? Was it to induce the employees to vote against the Union in the event of a second election? Was it an attempt to blame the Union for the employees not having received wages and other benefits increases earlier? Was it based on business justifications?

The Board in *Marine World USA*, 236 NLRB 89, 90 (1978), held:

> It is well settled, however, that the granting of wage increases and/or benefits during the pendency of a representation proceeding, including the pendency of objections to an election, is not per se unlawful. Rather, the test is whether, based on the circumstances of each case, the granting of increased wages and benefits is calculated to impinge upon the employees' freedom of choice in an upcoming scheduled election or an election which might be directed in the future.[6] Thus, for example, the Board has found the granting of new wages and benefits during the pendency of a representation proceeding to be lawful where an employer has established that such action was consistent with past practice,[7] such action had been decided upon prior to the onset of union activity,[8] or business justifications prompted the adjustment.[9]

[6] *McCormick Longmeadow Stone Co.*, [158 NLRB 1237 (1966)] supra at 1242; *Champion Pneumatic Machinery Co.*, 152 NLRB 300, 306 (1965).

[7] Cf. *The Gates Rubber Company*, 182 NLRB 95 (1970).

[8] See, e.g., *FMC Corporation, Power Control Division*, 216 NLRB 476 (1975).

[9] See, e.g., *Frito-Lay, Inc.*, 185 NLRB 400 (1970).

As noted in *Electric Hose Co.*, 262 NLRB 186, 205 (1982), increases in benefits implemented during the pendency of union objections to a Board-conducted election violates the Act if the circumstances indicate the employer was rewarding the employees for rejecting unionization or if the employer was seeking an advantage in the event the union prevailed in its objections and a second election was ordered.

I note with respect to the Company's contention that it might have lost certain employees if it had not granted the wages and other increases when it did was not supported by any objective evidence.

The evidence reflects Company President Hernandez attempted to accomplish two goals related to the Union's efforts at the Company when he announced on November 30, the employees would be given job classifications, increases in wages, and additional retroactive vacation days effective December 1. First, the unrefutted testimony of Union Vice President Figueroa shows ''[t]he campaign issues . . . were . . . vacations, the classifications, and the salary increases.'' Thus, an inference is warranted that Hernandez was rewarding the employees for rejecting the Union in that he was granting them exactly what they had been seeking to obtain with union help thus lessening the need for the Union by his actions. Second, Company President Hernandez acknowledged the Board had not resolved certain matters (unfair labor practice charges and the Union's objections to the election) before it and that he might be called on to answer for his actions; however, he announced the increases anyway saying he would take the responsibility for doing so. It is quite clear Hernandez was not unmindful that a possible second election could be directed in the future and that by eliminating the issues that concerned the employees he could influence the outcome of a second election if one was directed.

In summary, the circumstances as a whole and the context in which President Hernandez announced the wages and other benefits increases persuades me he was rewarding the employees for rejecting the Union and was also attempting to impinge on employees' freedom of choice in a possible future election. Such violates Section 8(a)(1) of the Act and I so find.

2. The alleged violations attributed to Vice President of Operations Munoz–Ayala[5]

It is alleged at paragraph 8(b)(i) that Munoz–Ayala on or about February 28, informed employees that if the Union lost the election, the Company would discharge senior employees and retain the junior employees.[6]

Mercado Hernandez testified he was working at ''Estanceas de Juana Diaz'' at a pay rate of $3.45 per hour and that on February 27, Munoz–Ayala sent an individual[7] to his home to ask him to work for the Company starting the next day (February 28) at a pay rate of $3.60 per hour. Mercado Hernandez said he had sometime earlier met Vice President of Operations Munoz–Ayala through a local baseball team. Mercado Hernandez testified Munoz–Ayala told him on several occasions that he had hired him so that he could vote in favor of the Company in the representation election. Mercado Hernandez testified:

> Mr. Munoz told me that if the factor[y] won the election they would throw out the old personnel and stay with the new ones who were trusted by them.

Vice President of Operations Munoz–Ayala testified he hired Mercado Hernandez but denied telling him he had hired him to vote for the Company. Munoz–Ayala also denied telling Mercado Hernandez that if the Company won the election, it would retain the new employees and get rid of the more senior employees. Munoz–Ayala stated other employees were hired about the time Mercado Hernandez was and that all were hired as a result of increases in production at the Company.

Although Mercado Hernandez at times exhibited poor recall of events and had to have his memory refreshen somewhat extensively, I am persuaded his lack of recall was not as a result of fabrication on his part. He impressed me as a credible although somewhat timid witness. His overall testimony had a ring of truth about it. In crediting his testimony, I am mindful that he is no longer employed by the Company and could possibly harbor bias against it; however, if he does harbor such bias, it was not exhibited while he testified.

In discrediting Munoz–Ayala's testimony, I note that no records were presented to support his assertion that other employees were hired at about the same time as Mercado Hernandez and that the hirings were based on increased production.

Based on the credited testimony of Mercado Hernandez, it is clear Vice President of Operations Munoz–Ayala unlawfully threatened to discharge the more senior employees at the Company based on union considerations. Such violates Section 8(a)(1) of the Act and I so find.

It is alleged at paragraph 8(b)(ii) that Munoz–Ayala on or about March or April told employees that if the Union won the election, the Company would close its operations.[8]

Mercado Hernandez testified Vice President of Operations Munoz–Ayala said that if the Union won the election, the Company would finish the contracts it had and close down in 2 weeks.

Munoz–Ayala denied making any such statement.

I credit Mercado Hernandez' testimony as outlined above.

Vice President of Operations Munoz–Ayala's comments constitute an unlawful threat to close the facility[9] and as such violates Section 8(a)(1) of the Act, and I so find.

It is alleged at paragraph 8(b)(iii) that on or about April, Munoz–Ayala informed employees that if the Union pursued processing objections to the election, scheduled benefits would be withheld.

Bonilla, as has been noted, was a member of the in-plant organizing committee. He testified that after the Company learned the Union had filed objections to the election all the employees were called two-by-two into Vice President of Operations Munoz–Ayala's office. Bonilla said he and fellow worker Vargas were ''called'' to Munoz–Ayala's office where they met with Munoz–Ayala and General Foreman Guzman. Bonilla testified:

> When we arrived at the office Mr. Munoz asked us what our opinion was of the objections that the Union, the Congreso Industriales had filed. I answered to him that I agreed with it—that we agreed to it. He commented that why didn't we leave that because there had been a series of promises that they were going to be given, that if we continued with the objections that that would go on from one month to five years and that in that period of time they could not grant us those promises. And he showed me a document that had the promises that were to be given to us but they could not be validated because there existed an objection.

Bonilla testified the promises he was shown related to salary increases, job classifications, and vacation modifications.[10]

Vice President of Operations Munoz–Ayala acknowledged having a conversation with Bonilla in April about the Union's objections to the election but testified:

> In April of that year some increases had been given because of the minimum salary motive. Those who were making $3.85 as I said previously were the ones that received the increase and the employees who did not receive the increase asked me why they did not receive an increase in salary.
>
> . . . .
>
> I explained to them that we were giving those increases because of the law. The others were not given

[5] I note that Munoz-Ayala's title in the complaint is alleged to be plant manager. However, he testified at trial his title was vice president of operations. Whatever his exact title may be, there is no dispute that he is, and at material times herein was, a supervisor and agent of the Company within the meaning of the Act.

[6] In her posttrial brief, counsel for the General Counsel moved to amend out the other portions of par. 8(b)(i) of the complaint that are not set forth above. I grant her unopposed motion.

[7] The intermediary was not identified in the record.

[8] In her posttrial brief, counsel for the General Counsel moved to amend out the other portions of par. 8(b)(ii) of the complaint that are not set forth above. I grant her unopposed request.

[9] I am not unmindful that counsel for the General Counsel did not establish the date for this conversation. The evidence, however, indicates it was between February 28 (Mercado Hernandez' first day of work) and April 5 (the date of the Board-conducted election).

[10] Although Vargas was called as a witness by counsel for the General Counsel, he was not asked about the above conversation.

> an increase because as we had an objection to the elections and until that case was not—results were not reached for that case we could not give them an increase.

Munoz–Ayala denied showing Bonilla an alleged list of promises the Company had made.

I credit Bonilla's testimony. I do so for a number of reasons in addition to his most favorable demeanor while testifying. First, I note that a short time after Bonilla's conversation with Munoz–Ayala, an employee circulated a petition seeking to have employees sign that they did not want the Union to pursue its objections to the election. Second, shortly after the conversation, Company President Hernandez granted the employees job classifications, increases in wages, and additional vacation benefits. The benefits granted were the same as ones Bonilla testified Munoz–Ayala showed him on a written list.

I find the Company violated Section 8(a)(1) of the Act when Vice President of Operations Munoz–Ayala told employees that promised benefits would be withheld for as long as the employees collective-bargaining representative pursued processing objections to the election. Such attempts to have employees persuade the Union not to pursue objections constitutes coercive interference with employees' Section 7 rights.

3. The alleged violations attributed to General Foreman Jose Guzman

It is alleged at paragraph 8(c)(i) of the complaint that General Foreman Guzman on or about February 19, threatened employees with plant closing and loss of jobs if said employees continued to support the Union.

Torres testified that on or about February 19 or 20,[11] General Foreman Guzman approached his work area and spoke of their friendship and how he considered Torres to be his trusted friend and one in whom he could confide. According to Torres, General Foreman Guzman then said that if his ''fellow workers continued with the idea of organizing themselves, it would cause the plant to shut down.''

Guzman was not called to testify at the trial. I credit Torres' uncontradicted testimony outlined above.

Guzman's statement constitutes an unlawful threat to close and as such violates Section 8(a)(1) of the Act. I reject the Company's contention that the admitted friendship between Torres and Guzman somehow lessened the coercive and threatening nature of Guzman's comments to Torres.

It is alleged at paragraph 8(c)(ii) that General Foreman Guzman on or about March informed employees that the Company was going to assist in establishing an in-house union, that employees were obligated to vote for the Company out of loyalty and instructed employees to inform fellow employees to vote against the Union.

Former employee William Cesar Cruz–Gonzalez testified about a conversation he had with General Foreman Guzman toward the end of March. According to Cruz–Gonzalez, Guzman told him he had given him (Cruz–Gonzalez) his job and that he had to vote for the Company because of that fact. Guzman ''told'' Cruz–Gonzalez to ''try to convince'' his brother-in-law to vote for the Company. Cruz–Gonzalez also testified Guzman told him that if the employees voted for the Company, the Company would form ''an in-house union'' for the employees.

As noted elsewhere, General Foreman Guzman did not testify. Cruz–Gonzalez seemed frightened at having to testify and was even unable to recite his address from memory. I do not, however, find such sufficient to discredit or reject his uncontradicted testimony. Accordingly, I credit his above-outlined testimony.

I find General Foreman Guzman's comments constitute conduct that tends to impinge on employees' Section 7 rights. First, Guzman impliedly threatened Cruz–Gonzalez with termination if he did not support the Company. Guzman reminded Cruz–Gonzalez that he had gotten him his job and that ''out of loyalty'' he owed his allegiance to the Company. Implicit therein is the understanding that if Cruz-Gonzalez' allegiance to the Company failed to materialize what he had been given, namely his job, could then be taken away. Second, General Foreman Guzman's attempt to have Cruz–Gonzalez dissuade a relative and fellow worker from supporting the Union, when viewed in context, also violates Section 8(a)(1) of the Act and I so find. See, e.g., *Culmtech, Ltd.*, 283 NLRB 163, 170 (1987). Third, to promise as General Foreman Guzman did, to establish an in-house union if the employees rejected the Union and voted for the Company violates Section 8(a)(1) of the Act and I so find.

It is alleged at paragraph 8(c)(iv)[12] of the complaint that General Foreman Guzman on or about April 5, informed employees the Company would establish an in-house union to implement its promises.

Bonilla testified credibly, without contradiction, that on the day of (April 5) but after the Board-conducted election, General Foreman Guzman invited him to ''participate in a celebration'' that the Company had won the election. Bonilla declined the invitation and General Foreman Guzman told him not to be that way that what had happened had already happened. Bonilla stated Guzman said the Company was going to create an in-house union with Torres as its head so the employees could ask for the benefits Company President Hernandez had offered.

I am persuaded General Foreman Guzman's promise to establish an in-house union for the purpose of implementing promises made by Company President Hernandez during the Union campaign constitutes unlawful interference with employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

4. The distribution of a leaflet

It is alleged at paragraph 8(e)[13] of the complaint that on or about April, the Company distributed a leaflet to employees informing them that if they participated in a strike, they would lose their jobs.

That the Company distributed the following leaflet to its employees during the union campaign is not disputed. The leaflet set forth in full follows:

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[11] The Union notified the Company in writing on or about February 20, that employee Torres was one of the Union's in-plant organizing committee members.

[12] At trial, I granted counsel for the General Counsel's motion to amend par. 8(c)(iii) out of the complaint.

[13] At the trial, I granted counsel for the General Counsel's motion to amend par. 8(d) out of the complaint.

TAKE NOTE TAKE NOTE TAKE NOTE

WHY DO WE SAY THAT DURAMAX CAN CONTINUE ITS OPERATIONS WITH OR WITHOUT A UNION?

AS WE EXPLAINED TO YOU IN ONE OF THE LEAFLETS WHICH WE HAVE CIRCULATED, THE UNIONS, SHOULD THEY WIN THE ELECTIONS, THEY USUALLY GO ON A STRIKE TO FORCE THE EMPLOYERS TO MAKE CONCESSIONS.

THE ONES WHO ARE HARMED IN THESE STRIKES ARE THE WORKERS BECAUSE THE EMPLOYER CAN CONTINUE ITS OPERATIONS WITH REPLACEMENTS AND YOU WOULD BE OUT WITHOUT RECEIVING YOUR PAY.

THERE ARE SITUATIONS WHERE THE STRIKERS COULD BE REPLACED PERMANENTLY AND YOU COULD LOSE YOUR JOB.

DON'T ALLOW YOURSELF TO BE DECEIVED, DURAMAX MIGHT BE ABLE TO CONTINUE OPERATING . . . NOT NECESSARILY WITH YOU WORKING.

I am persuaded the above statement informs employees that when unionization occurs, strikes are inevitable (''they usually go on strike to force the employers to make concessions''), but ultimately futile (''The ones who are harmed in these strikes are the workers . . . Duramax might be able to continue operating . . . not necessarily with you working'') and that the employees would lose their jobs as a consequence of a strike or permanent replacement (''the employer can continue its operations with *replacements* and you would be without receiving your pay. There are situations where the strikers could be *replaced permanently* and you could lose your job'').

The Board in *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989), explained:

> The Board's legitimate concern with protecting an employer's right to discuss potentially unfavorable aspects of unionization does not extend so far as to sanction propaganda that overtly raises the prospect of job loss and leaves employees on their own to divine that the ''loss'' is somehow less than total because it is conditioned by a right to return to work after the replacement's departure. Rather, our statutory duty to protect employees' free choice in a representation election requires finding that the Employer's unqualified statement about job loss ''may fairly be understood as a threat of reprisal.'' As such, it amounts to objectionable conduct that both violates Section 8(a)(1) of the Act and requires that the election be set aside.

The Board in *Baddour, Inc.*, 303 NLRB 275 (1991), further explained its rationale as follows:

> The Board in *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989), made it clear that employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacements. The phrase ''lose your job'' conveys to the ordinary employee the clear message that employment will be terminated. Further, if the employee is also told that his/her job will be lost because of replacement by a 'permanent' worker, the message is reinforced. In these circumstances, where the single reference to permanent replacement is coupled with a threat of job loss, it is not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a *Laidlaw* right to return to the job.

In summary, I find the language in the leaflet at issue constitutes a threat of job loss and as such violates Section 8(a)(1) of the Act.

5. Alleged improved working conditions

It is alleged at paragraph 8(f) of the complaint that on or about March and April, the Company improved working conditions to dissuade employees from supporting the Union.

Three former employees of the Company testified that between the time the Union filed its representation petition on February 16, and the time the Board conducted the representation election on April 5, the Company made certain improvements in the employees working conditions.

Bonilla testified that in March, working conditions ''changed totally.'' He said the Company installed a water fountain in the employees' working area. He explained there had previously been a water fountain ''in front of the offices'' but ''it was far for us to go to.'' Cruz–Gonzalez also testified a new water fountain was installed and both he and Torres stated the Company brought in ''bottled'' or ''cans of'' water for the employees to drink. Cruz–Gonzalez, Bonilla, and Torres each testified that during this time (February through April) the Company commenced to bring in ''a water truck'' to sprinkle the construction dust along the streets and in the working areas. Bonilla explained ''a lot of cement is used'' at the construction site creating ''a lot of dust.''

Torres testified:

> The workers had asked for a time clock to be put in. And our previous petition had not been met. And during the election campaign the Company handed a sheet out to inform us that the time clock was going to be put in.

On March 26, Vice President of Operations Munoz–Ayala issued a memorandum to all employees which reads in pertinent part as follows:

> Beginning today, Monday, March 26, 1990, an electronic time clock will be used to control the arrival and departure of all personnel. The same will be situated in front of the purchasing and personnel office.
>
> . . . .
>
> We hope that you will use it well, since it is for your benefit.

Bonilla testified that before the time clock was installed, the employees' times were ''never accurate'' but following the installation, the times were ''more precise . . . more accurate.''

Torres and Bonilla testified that during the February through April time frame the Company ceased charging employees a 10-percent surcharge on construction materials purchased from the Company for personal use. Torres explained ''[s]ome fellow workers bought material[s] at cost when beforehand they were charged 10 percent above the cost price.'' Bonilla testified the Company also started providing

a company vehicle to transport the materials to the employees' homes.

Counsel for the General Counsel presented invoices that reflect a 10-percent surcharge on materials purchased from the Company by the employees in December 1989 and January and February.[14] Counsel for the General Counsel also presented invoices that reflect employees were not charged the extra 10 percent on construction materials they purchased in March, April, and May.

Vice President of Operations Munoz–Ayala testified ''water cans have always existed at the Company'' but added ''[w]hat I did was to bring in some more.'' Munoz–Ayala said the bringing in of additional water cans and the filing of the Union representation petition ''more or less . . . coincided one with the other.'' He testified the Company also started sprinkling water on the dusty construction areas ''during that period of time.'' Munoz–Ayala also testified that during that same time frame the Company installed a water fountain but he added it did so where one had previously existed. Munoz–Ayala also acknowledged installing a timeclock which allowed more control over time keeping. He said he had observed discrepancies between the hours marked and the hours paid so ''around the beginning of February'' he had ''the idea to put in a time clock.''

I am persuaded the timing of providing drinking water for the employees—either by additional cans or a newly installed water fountain; sprinkling the construction areas with water to settle the dust; selling construction materials to the employees at the Company's cost; and, installing a previously requested timeclock was more than coincidental with the Union's filing of the representation petition. I am persuaded, in agreement with counsel for the General Counsel, that the Company took the above actions in an effort to lure its employees away from supporting the Union. The timing of the improvements alone causes me to reject the Company's contention they were instituted in the due course of business and not in an effort to dissuade the employees from supporting the Union. The Company failed to demonstrate any history or past practice of improving its employees' working conditions in any manner similar to what it did herein. In that regard, there is no showing the Company had ever before attempted to control construction site dust. The timeclock, although requested for some time by the employees and assertedly thought of by Vice President of Operations Munoz–Ayala in early February, was not installed until mid March when the Union's organizational campaign was well underway. The Company's past practice with respect to selling construction materials to its employees demonstrates it made a change in that regard in that it ceased accessing a surcharge for purchased construction materials after the Union came on the scene.

Accordingly, I find, as alleged in the complaint, that the Company in March and April improved working conditions for its employees to dissuade them from supporting the Union. Such violates the Act and I so find. See, e.g., *Montgomery Ward & Co.*, 288 NLRB 126, 127 and cases cited at fn. 6 (1988); *Walter Garson, Jr. & Associates*, 276 NLRB 1226, 1240–1241 (1985).

[14] There are some invoices in this timeframe that do not reflect the surcharge, however, the invoices that do not are for tools that were lost or for empty oil drums sold to the employees as garbage drums.

C. *The 8(a)(3) Allegations*

It is alleged at paragraph 9 of the complaint that on or about November 30, the Company granted its employees Torres, Bonilla and Vargas wage increases that were less than the wage increases it granted its other production and maintenance employees.

As is noted elsewhere in this decision, Company President Hernandez informed the employees on or about November 30, they were being reclassified and given wage increases. I have concluded, again as set forth elsewhere in this decision, that Hernandez announced the reclassifications and wages and other benefits increases in order to reward the employees for rejecting the Union and to impinge on the employees' freedom of choice in any future Board-conducted election. Notwithstanding the above, a further issue must now be examined and that is whether the Company discriminatorily selected employees for various classifications and resulting wages and other benefits increases based on their support or lack thereof for the Union.

The Company contends the reclassifications and resulting wages and other benefits increases were motivated solely by business considerations. Counsel for the General Counsel, on the other hand, asserts the Company classified employees Torres, Bonilla, and Vargas lower than they should have been and that as a result, they received wages and other benefits increases that were less than they should have received and that the Company was motivated at least in part by the three's support for the Union.

Torres, as noted elsewhere in this decision, had worked for the Company for approximately 5 years and had been identified as one of the Union's in-plant organizers in a February 20, letter from Union Vice President Figueroa to the Company. Torres testified that on or about November 30, the Company classified its carpenters and that he was classified as a carpenter II and given a 35-cent-per-hour wage increase which brought his hourly wage rate from $4 to $4.35 per hour. He testified that carpenters I received a 50-cent-per-hour wage increase which brought those employees hourly wage rates from $4 to $4.50 per hour. Torres testified two employees, namely Angel Aponte and Jose Juan Sanchez, were classified as carpenters I while he, Miguel Aponte, Hector Fermen Serrano, and Orlando Perez were classified as carpenters II. He said the Company explained that those classified as carpenters I ''did special work'' while those classified as carpenters II did the ''simplest jobs.'' Torres testified, without contradiction, that he performed all facets of work in the home building industry. Torres specifically testified he had worked as a ''mason,'' ''a kitchen carpenter,'' ''a roof[ing] carpenter,'' and ''a module carpenter.''

Torres acknowledged on cross-examination that two of the employees that received the same carpenter II classification that he did actively supported the Company and opposed the Union during the organizational campaign. He also acknowledged that the two employees who were classified as carpenters I could perform ''a lot of jobs, different job'' but added he ''could do the same jobs they did.''

Bonilla worked for the Company for approximately 5 years as a welder under General Foreman Guzman. Vargas, who is still employed by the Company, has worked as a welder for approximately 6 years. Both Bonilla and Vargas were known supporters of the Union. Bonilla was identified

in Union Vice President Figueroa's February 20 letter to the Company and Vargas wore union T-shirts at work.

Bonilla testified, without contradiction, that six employees were performing welding tasks at the Company at the end of November when the Company classified its welders into welders I, II, and III. Bonilla testified he, Ariel Calon, and Vargas were classified as welders II. Those working as welders II had their hourly wage rates increased form $4 to $4.35 per hour effective December 1. Those classified as welders I had their hourly wage rates increased from $4 to $4.50 effective December 1. Bonilla stated that Oscar Diaz and Anibal Davila were classified as welders I and that Javior de Jesus was classified as a welder III. Bonilla said he was told the Company selected Diaz as a welder I because he was an ''accommodator''[15] and Davila was selected because he was ''a fabricator.''[16] Bonilla said that before Davila, who is General Foreman Guzman's brother-in-law, was brought in at the Company, he and Vargas worked as fabricators. Vargas testified he worked as a fabricator and that after Davila left the Company, he did Davila's job. Bonilla testified he and Vargas were not satisfied with their classifications and as a result they asked Vice President of Operations Munoz–Ayala ''what had happened'' and why they had been classified ''so badly.'' According to Bonilla, Munoz–Ayala said he had nothing to do with the reclassifications, that Company President Hernandez, the Company's attorney, and company official Figueroa had made the decisions regarding the classifications. Bonilla testified they tried to speak with Company President Hernandez but ended up speaking with Figueroa. Company official Figueroa told them Vice President of Operations Munoz–Ayala and General Foreman Guzman had done all the reclassifications. Bonilla said they then returned to Vice President of Operations Munoz–Ayala who told them what had already been done with respect to the classifications was it and nothing more could be done, and told them ''if you don't like how it was done you can come to the office and present your resignation.''

Bonilla acknowledged on cross-examination that Diaz had more seniority than he did but not more than Vargas.

Vice President of Operations Munoz–Ayala testified the reclassification of employees was effective on December 1. In addressing the reasons for the reclassifications, he testified:

> One of the reasons that we made a reclassification was to have an idea of how to place the employees. The other reason was that it had been a long time since they had received an increase and we—there was a possibility—we had the possibility of losing key employees.

Munoz–Ayala explained the Company established three classifications— carpenters/welders I, II, and III. He testified that in classifying employees:

> We used a series of factors, seniority, ability to do the job, the type of job that they did, and the versatility that they could achieve on the job.

Munoz–Ayala testified Torres was classified as a carpenter II and Bonilla and Vargas were classified as welders II based on the above-listed factors. He testified the Union activities of the three employees played no part in their being assigned the classifications indicated.

As to the Company's failure to classify employee Torres as a carpenter I and employees Bonilla and Vargas as welders I and to pay them accordingly, the credited evidence shows as follows: The Company opposed unionization at its facility to the extent of unlawfully threatening to close if the Union won the election; it threatened to discharge employees because of their membership in or activities in support of the Union; it threatened employees they would lose their jobs if they participated in an economic strike at the Company; it promised employees to establish, promote, and/or sponsor an employee committee as an alternative to the Union for the employees to secure better working conditions; informed its employees that promised benefits would be withheld as long as the Union processed objections to the Board-conducted election; and it announced and granted wages and other benefits increases to its employees for rejecting the Union. It is beyond dispute that Torres, Bonilla, and Vargas supported the Union and that the Company knew of their support. Torres and Bonilla were identified to the Company as in-plant organizers while Vargas wore union T-shirts at work. The Company clearly viewed Torres as the leading employee supporting unionization at the Company. Immediately after the Board-conducted election was held on April 5, Company President Hernandez told Torres he had expressed himself very well during the campaign and that he was going to form an employee committee to work with the Company and that Torres could head the committee. President Hernandez also told Torres in that same conversation that the law had not permitted him to say so earlier but that if the Union had won the election, he would have closed the plant. That Bonilla was viewed as favoring the Union is demonstrated in part by Vice President of Operations Munoz–Ayala's asking Bonilla his opinion regarding the objections the Union had filed to conduct affect the results of the election and Bonilla's answering that he agreed with the Union's actions. Munoz–Ayala even asked Bonilla why the employees didn't leave the objections alone because it interfered with the Company's giving the employees a number of promised benefits such as job classifications, salary, and vacation increases. Finally, these three known union supporters, although testifying they were fully qualified, were not selected for classifications as carpenters or welders I where their wages would have been increased to the top of the Company's pay scale.

The foregoing evidence and the record as a whole shows at least prima facie that the Company failed to classify Torres as a carpenter II and Bonilla and Vargas as welders II because of their support for and activities on behalf of the Union. Accordingly, such actions by the Company constitutes unfair labor practices unless the Company can demonstrate by a preponderance of the evidence that it would have classified the three as it did even in the absence of any union activities on their part. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in which the Supreme Court sanctioned the *Wright Line* analysis. The Company failed to discharge its burden.

[15] The duties of one occupying an accommodator's position was not explained in any detail in the record.

[16] The duties of one occupying a fabricator's position was not explained in any detail in the record.

Although the Company contends it had business justifications for the classifications given the employees, it failed to support such with objective evidence. The Company did not present records to show employee seniority which was one of the four factors it claims it utilized in classifying its employees. The Company failed to present any evidence to refute Torres', Bonilla's, and Vargas' claims they had the ability and versatility to perform the job duties of category I classifications. The Company failed to present evidence to demonstrate how the factors it allegedly used to classify employees applied in general or to the three employees in particular. The Company failed to establish the job duties performed by the three employees at question herein or to highlight how the three failed to meet the standards or perform the tasks necessary for category I classifications.

In summary, I find the Company failed to demonstrate it would have classified and paid the three employees in question as it did even in the absence of any union activities on their part. Accordingly, I find the Company violated Section 8(a)(3) and (1) of the Act when on or about November 30, it failed to classify its employees Torres, Bonilla, and Vargas in work and pay classifications I.

D. *The Objections*

Having found support in the record for certain of the objections to the conduct affecting the results of the election filed by the Union (Petitioner) in Case 24–RC–7305, namely, Objections 2 and 11[17] and having also concluded that such conduct violates Section 8(a)(1) of the Act, I conclude the Company has interfered with the exercise of employee free choice in the election conducted on April 5. Accordingly, I recommend that election be set aside and a second election be directed.

CONCLUSIONS OF LAW

1. Casa Duramax, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Congreso de Uniones Industriales de Puerto Rico is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act: by threatening to close its facility if the Union won the representation election or if the employees continued to seek union representation; by promising to establish, promote, and/or sponsor an employee committee (or in-house union) as an alternative to the Union for employees to secure better working conditions; by announcing and granting wages and other benefits increases to reward its employees for rejecting the Union and/or to influence their choice with respect to union representation in any future Board-conducted representation elections; by threatening to discharge employees because of their support of or membership in the Union; by telling employees that promised benefits would be withheld so long as the Union pursued processing objections to the Board conducted representation election; by threatening its employees they would lose their jobs if they participated in an economic strike at their facility; by impliedly threatening to terminate employees if they did not support the Company and oppose the Union; by asking employees to dissuade fellow workers from supporting the Union; and, by improving working conditions to dissuade employees from supporting the Union.

4. The Company violated Section 8(a)(3) and (1) of the Act by, on or about November 30, failing and refusing to classify Wilberto Torres as a carpenter I and by on or about that same date failing and refusing to classify Manuel Bonilla and Melquiades Vargas as welders I and by failing and refusing to pay these three employees the wages prescribed for carpenters I and welders I.

5. By certain of the unfair labor practices found herein, the Company has interfered with the freedom of choice of its employees and it is recommended that the election held on April 5, in Case 24–RC–7305 be set aside and that a second election be directed.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company unlawfully failed to classify Torres as a carpenter I and Bonilla and Vargas as welders I, I shall recommend that they be so classified immediately and that they be made whole for lost earnings they suffered by reason of the failure to be so classified, with interest.

Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[18]

Finally, I recommend the Company be ordered to post an appropriate notice to employees attached hereto as ''Appendix'' for a period of 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy the unfair labor practices. I recommend the notice to employees be posted both in English and in Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Company, Casa Duramax, Inc., Coto Laurel, Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Classifying Torres as a carpenter II rather than as a carpenter I, and Bonilla and Vargas as welders II rather than as welders I because of their membership in or activities on behalf of the Union.

[17] No evidence was presented in support of Objection 10. I shall recommend that Objection 10 be overruled.

[18] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening to close its facility if the Union won the representation election or if the employees continued to seek union representation.

(c) Promising its employees to establish, promote, and/or sponsor an employee committee as an alternative to the Union for the employees to secure better working conditions.

(d) Announcing and granting wages and other benefits increases to reward employees for rejecting the Union and/or to influence their choice with regard to union representation in any future Board-conducted representation elections.

(e) Threatening to discharge employees because of their support of or membership in the Union.

(f) Telling employees that promised benefits would be withheld so long as the Union pursued processing objections to the Board-conducted representation election.

(g) Threatening employees they would lose their jobs if they participated in an economic strike at the Company.

(h) Impliedly threatening to terminate employees if they did not support the Company and oppose the Union.

(i) Asking employees to dissuade their fellow workers from supporting the Union.

(j) Improving working conditions to dissuade employees from supporting the Union.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Classify Torres as a carpenter I and Bonilla and Vargas as welders I and make them whole for the loss of earnings they suffered as a result of their not being so classified in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Coto Laurel, Ponce, Puerto Rico facility copies of the attached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the results of the election held on April 5, 1990, in Case 24–RC–7305 be set aside and that the representation matter be remanded to the Regional Director for Region 24 for the purpose of conducting a new election at such time as she deems the circumstances permit the free choice of a bargaining representative.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to close our facility if the Union wins the representation election or if our employees continue to seek union representation.

WE WILL NOT promise to establish, promote, and/or sponsor an employee committee as an alternative to the Union for our employees to secure better working conditions.

WE WILL NOT announce and/or grant wages and other benefits increases to reward our employees for rejecting the Union and/or to influence their choice with respect to union representation in any future Board-conduct representation elections.

WE WILL NOT threaten to discharge our employees because of their support of or membership in the Congreso de Uniones Industriales de Puerto Rico or any other labor organization.

WE WILL NOT inform you that promised benefits will be withheld so long as the Union pursues processing objections to the Board-conducted representation election.

WE WILL NOT threaten our employees that they will lose their jobs if they participate in an economic strike at our facility.

WE WILL NOT, impliedly or otherwise, threaten to terminate our employees if they do not support the Company and oppose the Union.

WE WILL NOT ask our employees to dissuade their fellow workers from supporting the Union.

WE WILL NOT improve working conditions to dissuade our employees from supporting the Union.

WE WILL classify Wilberto Torres as a carpenter I, and employees Manuel Bonilla and Melquiades Vargas as welders I, and WE WILL make them whole for the wages they lost as a result of our failure to so classify them.

CASA DURAMAX, INC.